No. 17,056

United States Court of Appeals

For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLANTS

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JURISDICTION

This is an appeal from a judgment for property damage caused by flood waters in the American River in 1953, during the construction of the Folsom Dam.

Appellants are respectively Delaware and Connecticut corporations.[1] Appellee is a California corpora-

[1] T. 7, 8.

tion.[2] The amount in controversy exceeds $10,000.00, exclusive of interest and costs.[3] Therefore, the District Court has jurisdiction under Title 28, U.S.C.A. §1332.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Title 28, U.S.C.A. §1291.

STATEMENT OF THE CASE

The case arises in this way. Appellants were building the Folsom Dam, under contract with the government. Appellee was building a power plant adjacent to the dam, under contract with another branch of the government. Pursuant to their contract, appellants erected a temporary dam (called a "cofferdam") to hold the water back from the permanent dam during construction, and another cofferdam below the permanent dam to prevent backing up of water from below. During high water, the upstream cofferdam gave way on January 9, 1953, and the resultant flow damaged the works of appellee. Thereafter appellants reerected the upstream cofferdam, and it gave way again on May 20, 1953, again damaging appellee's works.

Appellee sued for the damage thus suffered, claiming that it was due to the negligence of appellants.[4] It claimed that the damage due to the January 9th in-

[2]T. 7.

[3]T. 8. Pre-Trial Order states that the amount in controversy exceeds $3,000, which was the jurisdictional minimum when suit was brought. The amount prayed for in the complaint exceeded $10,000. T. 11, 12.

[4]Appellee also sued the U.S.A. The case against the U.S.A. was tried in conjunction with the suit against appellants but matters

cident was $493,787.69, and that the damage due to the May 20th incident was $25,975.04, or a total of $519,-761.73. The jury gave appellee a verdict for the full amount prayed for, namely $519,761.73. From the judgment for that amount, this appeal is taken.

Two questions are involved in this appeal, and they arise as follows:

First Question

Appellee claimed that appellants were negligent in the maintenance of the cofferdams in several respects. One of the claims was that appellants left the upstream cofferdam in too long on January 8 and 9, and that if they had breached it when the water was rising the damage would have been avoided. Appellants contend that they were bound under their contract with the government to leave the cofferdam in as they did; that that exempted appellants from liability for such claim; and that the trial court erroneously withheld that defense from the jury.

Because appellants were not so bound with respect to the May 20 incident, appellants do not contend that the government contract defense applies to that incident and therefore what happened on that date may be disregarded in the argument on this point.

Second Question

As stated, the jury awarded all the damages prayed for by appellee. Appellants contend that $110,000.00

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of fact and law relating solely to the case against the U.S.A. were presented outside the presence of the jury. Appellee dismissed against U.S.A. prior to submission to the jury of its case against appellants.

of the judgment is improper because the evidence fails to show damage in that amount.

SPECIFICATION OF ERRORS

Appellants rely upon four errors as grounds of this appeal. These errors are enumerated below. The first three relate to the *First Question* above mentioned. The fourth relates to the *Second Question.*

Of the group of the first three errors, the first one consists in the court's refusal to give the jury an instruction requested by appellants which would have afforded to appellants the defense that they acted in compliance with their contract with the government, and the second and third consist in the giving of two instructions which in effect affirmatively deprived appellants of that defense and augmented the error of refusal to give appellants' requested instruction.

The Errors

The errors relied upon, and the grounds of objection urged at the trial, are as follows:

1. Refusal of an Instruction

The District Court erred in refusing to give the jury Instruction No. 13, requested by appellants. Because of its length, we have placed the full text of this instruction in the Appendix to this brief.[5] In essence, the instruction was to the following effect:

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[5]T. 41-43.

Where a party like these appellants contracts with a public agency like the U.S.A. to construct a dam according to plans and directives, and the contractor performs the work with proper care in accordance therewith, but the work results in damage to others such as appellee, the contractor is not liable for such damages unless the plans or directives were inherently dangerous and defective and the contractor knew, or in the exercise of ordinary care should have known, that they were. It is a question of fact for the jury to determine whether the defense afforded by this doctrine is a defense to the defendants in this case, and in this connection the jury may consider whether there was inherent danger, and whether the defendants knew or should have known that there was such danger, in the plans and directives relating to the matters in issue which were specified in the instruction.

Under Rule 51, appellants filed their objection to the court's refusal to give the above instruction, the objection being, in effect, that appellants were required by their contract to keep their cofferdam in place up to the time of the flood on January 9, 1953.[6]

2. Giving an Instruction

The District Court erred in giving an instruction relating to the above subject. This instruction,[7] too, we have placed in the Appendix, because of its length. The instruction stated that, subject only to the con-

[6]T. 1779-1781.
[7]T. 1760, 1761; 1785, 1786.

tract specification of the elevation of the upstream cofferdam, namely, a minimum of 237 and a maximum of 250 (which means feet above sea level), appellants had the responsibility and discretion to determine the design, construction, operation and maintenance of the cofferdam, including whether to breach it or let the water overtop it.

Appellants excepted to the instruction, as follows:

> "Mr. Driscoll. . . . the defendants take exception to the instruction of the Court which stated to the jury as a matter of law the meaning of the contract, on the grounds that we feel here that the discretion that we had, as stated by the Court, was covered by the contracts and Supplemental Agreement No. 1, and the evidence, on the day of January 9th and that the defendants' Instruction No. 13, I believe it is, concerning the government contract defense should have been submitted to the jury."[8]

3. Giving an Instruction

The District Court erred in giving an instruction (set out in the Appendix[9]) in which it explained to the jury that the contract between the government and appellants for the construction of the dam and the contract between the government and appellee for construction of the power plant were entirely separate and that the provisions of these two contracts did not create any rights or obligations between appellants and appellee.

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[8]T. 1776, 1777.

[9]T. 1746-1748; 1786-1788.

Appellants' exception to the instruction in Specification No. 2 is applicable to the instruction last quoted.

4. **Lack of Evidence as to $110,000.00 of Damage.**

The evidence is insufficient to support the judgment of $519,761.73 in respect to the award therein for $110,000.00 for appellee's claim of "premium time and other costs to avert 1954-55 winter losses" and "loss of job momentum and interference with job efficiency" for the occurrences of January 9, 1953 and May 20, 1953.[10]

ARGUMENT

I

THE COURT ERRED IN WITHHOLDING FROM THE JURY THE DEFENSE THAT APPELLANTS ACTED PURSUANT TO ITS GOVERNMENT CONTRACT

The Claims of Negligence

Appellee claimed that appellants had been guilty of negligence in the following principal respects:[11]

(1) Faulty materials in the upstream cofferdam;

(2) Faulty protective covering around discharge pipes in the cofferdam;

(3) Raising the cofferdam from elevation 237 to 250 in the flood season;

(4) Maintaining it without a prudent plan for controlled, safe release of water in the flood season; and

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[10]T. 1789.

[11]These claimed acts of negligence were enumerated in an instruction given by the trial judge. T. 1755, 1756.

(5) Failure to breach the cofferdam (also the lower cofferdam) on the day of the flood.

Government Contract Defense

Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government.[12]

The doctrine of this defense is undisputed. It is this:

Where a plan in a government contract is not inherently dangerous, or the contractor is not chargeable with knowledge of such danger, and where he follows the plan, and commits no independent negligence in so doing, he is not liable for damage to property of others resulting from the execution of the plan.

Marin Water District v. Peninsula Paving Co. (1939), 34 C.A. 2d 647, 94 P. 2d 404;

Hamilton v. Harkins (1956), 146 C.A. 2d 566, 304 P. 2d 82.

The rule was stated in the *Marin Water District* case as follows (pp. 652, 653):

> "So far as the contractor is concerned, the proper rule of liability is thus stated in *Northwestern Pac. R.R. Co. v. Currie,* 100 Cal. App. 173, at p. 175 [279 Pac. 1057]:
>
> 'Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results

[12]T. 10, 11.

in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (citations); but where the contractor departs from the contract, plans or specifications, or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed. (citations).' "

The doctrine was restated in the *Hamilton* case (p. 570):

"Although the language used in some of the cases has not always been consistent, we think the proper rule is that on public work a contractor is liable to the damaged property owners only where he is negligent in the performance of the contract . . . , or, where the plans are defective, the contractor knows or should have known that the defect existed and that if the contract were performed as specified damage might ensue. But the contractor is not liable where the plans and specifications prepared by a public agency are defective but the contractor has no knowledge, express or implied, of the defect."

The Trial Court Withheld the Defense From the Jury

As seen above, the trial court refused to submit the defense to the jury. It did so in two ways: by refusing to give the instruction on that subject requested by appellants, and by giving instructions which said that the maintenance of the cofferdam was a matter within

the discretion of appellants and which therefore placed on appellants the responsibility for the damage resulting from the plan if the jury thought the damage was so caused.

The sole issue on this point is whether the court erred in this ruling; and that depends on the terms of the contract and on the other facts of the case.

In considering the facts, it may be of some assistance to have in mind the issues a little more in detail.

Appellee contends—and the trial court concurred—that in respect of all the items of claimed negligence, appellants had discretion, under their contract, to do what they did. Appellants, on the contrary, contend that while they did have such discretion with respect to the first three items of claimed negligence, namely, the character of materials in the upstream cofferdam, the insulation of the discharge pipes, and the height of the cofferdam (within the range of elevation 237 to 250), they did not have discretion in respect of the remaining two claims of negligence, namely, lack of a plan for control of the water, and failure to breach the cofferdam, in which latter two respects they were bound by the contract and directives of the government.

There are three elements of a government contract defense:

1. That the contractor followed the plan;

2. That he did so without negligence, independent of the plan itself; and

3. That the plan was not inherently dangerous (or if it was, that the contractor did not know it, or was not chargeable with knowledge of it).

Here, appellants followed the plan. That fulfills the first requirement.

Whether appellants were negligent or not was at issue. Appellee said that appellants were exercising their discretion and in so doing had committed negligence, in all five respects. Appellants contend that they were not negligent in any respect, and on the last two grounds—namely, the maintenance of the cofferdam in the flood season—appellants contend that they were not free, but were bound by the contract to leave the cofferdam in as they did.

On the question whether the plan was inherently dangerous or not, the issue was this. Appellants contend that it was not inherently dangerous. Appellee admits this on condition that appellants were not bound by the contract as above stated, but appellee contends that if appellants were so bound then the plan itself was inherently dangerous.

As a practical matter, for the purpose of this appeal, we could now narrow the issue to the following:

Regarding our maintenance of the cofferdam until the time of the flood, we contend that all the elements of the government contract defense are present, namely:

1. We did not depart from the plan;

2. We were not negligent in carrying out the plan —we do not have to maintain this as a matter of law,

but merely show that there was evidence which would have justified a finding by the jury to that effect; and

3. The plan was not inherently dangerous—again, all we have to show is that the jury could have so found.

On the issues other than leaving the cofferdam in until the flood, the evidence was in conflict, justifying a verdict either way. The point on appeal is that on one of the issues at least, namely, leaving the cofferdam in as was done, we were entitled to raise the government contract defense, and since there is no way of telling on what ground the jury held appellants liable, the error of excluding that defense was prejudicial.

Therefore the evidence should be reviewed from the standpoint of the questions:

> *Were we required by the contract and directives of the government to leave the upper cofferdam in as we did?* and
>
> *Was the plan not inherently dangerous as thus interpreted—or if it was, were we unaware of it, and innocently so?*

If the evidence, even though in conflict, would support a positive finding on these two questions, the ruling of the trial court was erroneous and ground for reversal.

The Evidence Shows That the Government Contract Defense Should Have Been Presented to the Jury

The Terms of the Contract and the Events That Happened

On September 13, 1951, appellants (whom we shall call Merritt-Savin) contracted with U.S. Army Corps of Engineers (Corps) to build Folsom Dam. The plan was this. To keep the dam site dry, in order to build the dam, Merritt-Savin were to build a cofferdam above the dam site and another one below it. The upper one, of course, was to hold the water back. The water would then be diverted around the dam site by an underground tunnel, supplied by the government through another contractor. This tunnel released the water back into the river bed at a point below the dam and below the lower cofferdam. The lower cofferdam would prevent the released water from backing up against the permanent dam from below.

On April 10, 1952 appellee (Atkinson) contracted with the U.S. Bureau of Reclamation to build a power plant adjacent to the dam. Atkinson built a cofferdam of its own, which was between the permanent dam and Merritt-Savin's lower cofferdam. It consisted of large steel cells filled with rock and dirt connected up with a concrete wall which was part of Atkinson's permanent works. Its purpose was to keep water out of its work area if the river should overflow Merritt-Savin's upper cofferdam and permanent dam.

The flood in question occurred on January 9, 1953, when the river overtopped the Merritt-Savin upper cofferdam and swept it away, overtopped the permanent concrete dam then being built, and then knocked

down a portion of Atkinson's cofferdam resulting in the damages here sued for.

A few photographs in evidence[12a] furnish a view of these works. Exh. A-1 is an aerial view of the whole area. It shows the upstream cofferdam, the concrete beginnings of the permanent dam, the Atkinson cofferdam, and at the left bottom the downstream cofferdam. It also shows the route of the diversion tunnel by which the water from the river above the upstream cofferdam was diverted around the dam site and released through the tunnel outlet below the lower cofferdam. Exh. A-3 gives a closer view of the upstream cofferdam and of the concrete base of the permanent dam in construction. Exhs. M-205 and M-207 show the Atkinson cofferdam, which was later damaged by the flood.

In the contract, Corps agreed to furnish the diversion tunnel by March 1, 1952.[13] Early in 1952, they discovered they could not do so, but they agreed to furnish it on June 19, and they directed Merritt-Savin to begin to divert at that time.[14] To "divert" means to build the upper cofferdam, which would stop the flow through the natural river bed and thus cause it to run down through the diversion tunnel, its only means of escape. This change was embodied in what

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[12a]By stipulation and Court order, exhibits were not printed but are to be considered in their original form. Exhs. M-205 and M-207, which are 8 x 10 photos and which are mentioned below in the brief, are bound in a book with other photos of the same size.

[13]Exh. A-16-A, Part IV, Sec. 1-02, pp. 1-1, 1-2.

[14]T. 1195-1197.

is known as Supplemental Agreement No. 1, further explained below.

In dam building, the year is divided into two seasons: the flood season and the diversion season. Roughly speaking, the first six months are the flood season and the second six months the diversion.[15] The object in dam building is to get the permanent dam up to sufficient height to act as its own cofferdam in the first diversion season. If this is achieved, and if the cofferdam is washed out by the winter flow, the effect is this: water runs through the diversion tunnel to the extent of its capacity; the remainder accumulates in a pool above the permanent dam structure; and if there is any excess, it flows over the top of the permanent dam, which, being concrete, is not damaged. Then, when the stream subsides, the work area below the dam is pumped out, and construction is resumed. If the contractor cannot get the permanent structure high enough to achieve this purpose in the first diversion season, then, when the upper cofferdam is swept out by flood waters, the permanent works are submerged and work stops, usually for the season, thus causing costly delay in completion of the dam. Ordinarily, there is also damage to the contractor's works. Therefore, there is a two-fold objective: first, get up the cofferdam and start work on the permanent dam as early as possible in the year, and secondly, stay in the river, i.e. keep working on the permanent dam, as long as possible.

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[15]T. 1560.

In some years, the water level would never rise above the top of the cofferdam,[16] in which case there would be no interruption of the permanent dam. That would be ideal. The next best result would be that by the time the water overtopped the cofferdam the permanent dam would have been brought up to a sufficient height to serve as its own cofferdam. And if neither of these results were achieved, the object would be to stay in the river as long as possible. The reason for the latter is that while the water is rising there is always the chance that it may subside without overtopping the cofferdam, and even if it does overtop, the longer the contractor stays in the river the more progress he can make on the dam.

On the other hand, care must be taken that the cofferdam be not too high, because if it is, the pool which it creates may be so big that if the cofferdam should collapse from overtopping the quantity of water thus released may overflow the river channel proper and cause riparian damage below.[17]

All these possibilities were calculated in the present case. This is revealed in the testimony of Jack D. Brooks, Chief of the Dam Design Section of the Corps on the Folsom Dam project,[18] and of Colonel Clarence C. Haug, Corps Engineer on the project,[19] which was to the following effect:

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[16]In the past 40 years, the flow would have exceeded the capacity of the diversion tunnel and overtopped the cofferdam 3 times to Dec. 1, 8 times to Dec. 15, and 13 times to Jan. 1. T. 792.

[17]T. 958; 1122, 1123.

[18]T. 949.

[19]T. 1120, 1121.

The specifications of the contract contemplated an earth cofferdam, which was expected to wash out when overtopped.[20] Overtopping would occur when the river exceeded the capacity of the diversion tunnel.[21] The Corps studied the maximum flow of waters over the years to determine the height of cofferdam which, if overtopped, would not cause damage downstream.[22] So the contract (as amended) provided that the upper cofferdam should be not less than 237 nor more than 250 elevation.[23] Merritt-Savin had discretion to erect it anywhere within those limits.[24] The diversion tunnel was built to carry 12,000 cubic feet of water per second for a cofferdam of 237 feet elevation and 15,000 cubic feet of water for a cofferdam of 250 feet elevation.[25] On the basis of the height reached by the river in previous years, the government calculated that the cofferdam would be washed out during the winter. On the average, they calculated that that would occur above November 15th, though it might not be until January. Raising the cofferdam from elevation 237 to 250 increased the chances of the contractor staying in longer.[26] The ordinary consequence of the cofferdam being swept out would be that the contractor's work would be suspended until June or July.[27]

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[20]T. 1098, 983.
[21]T. 959.
[22]T. 958, 1122, 1123.
[23]Exh. A-16-A, Part IV, Sec. 1, page 1-2.
[24]T. 1086, 1087.
[25]T. 961.
[26]T. 1178, 1068.
[27]T. 959, 960.

Merritt-Savin first built the cofferdam to elevation 237, and then increased it to elevation 250.[28]

The contract (as amended) provided that the contractor should try to get the concrete dam up to elevation 220 by the end of the first diversion season.[29]

Another provision:

> "If the concrete dam section is sufficiently above streambed before overtopping of the cofferdam at the end of the first diversion season, diversion through the tunnel during the flood season shall be continued, except for intermittent overtopping by floods, and no water shall be passed through the conduits in the dam. If the concrete dam section is not sufficiently above river level to continue diversion after overtopping of the upstream cofferdam at the end of the 1952 diversion season, the river shall be rediverted by reconstructing the cofferdams at the end of the flood season and diversion carried through the tunnel after the overtopping of the cofferdam in 1953."[30]

While this clause does not specify what "sufficiently above streambed" would be, it seems clear that it means 220 feet—the elevation which the contractor was to strive for, as provided in a clause in the contract shortly preceding the above quoted clause.[31]

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[28]T. 777, 1068, 1069.

[29]Exh. A-16-A, SC-42 *d*.

[30]Exh. A-16-A, SC-42 *f*.

[31]This elevation was originally specified as 215 feet; then it was changed by Addendum No. 1 to 225; and finally changed to 220 by Supplemental Agreement No. 1. Exh. A-16-A, SC-42 *d;* Exh. M-20.

Therefore, the plan contemplated that if the cofferdam overtopped in the winter of 1952-53, and if at the time of that overtopping the concrete dam was below 220 feet, the work would be suspended until the next season. This in turn contemplates that the overtopping of the cofferdam would cause it to be washed away. All these things so happened; that is, the cofferdam did overtop in the first diversion season, with the result that it was swept away, and the low monolith of the concrete dam at that time was only 143 feet.[32]

To return to the contract—bearing in mind that we are looking at it to see if it did not require compliance by the contractor with government directives regarding maintenance of the cofferdam:

It stated that "The work will be conducted under the general direction of the Contracting Officer . . ."[33] (that is, the government).

It required the contractor "to prosecute (the) work with faithfulness and energy, and to complete the entire work ready for use not later than 1,200 calendar days after date of receipt of written notice to proceed."[34]

It required progress reports, and if, in the opinion of the Contracting Officer, the Contractor falls behind schedule "the Contractor shall take such steps as may be necessary to improve his progress and the Contracting Officer may require him to increase the number of shifts . . ."[35]

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[32]T. 1567.

[33]Exh. A-16-A, SC-17.

[34]Exh. A-16-C, page 2; Exh. A-16-A, SC-01.

[35]Exh. A-16-A, GC-05 *a*, *b* and *c*.

It provides that failure to comply with requirements shall be grounds for determination that the contractor is not prosecuting the work with diligence insuring completion within the time specified and that the government may then terminate his right to proceed.[36]

"The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government."[37]

It may order extras or make changes within the general scope of the specifications.[38]

The contract specifies in detail the order of the work, including, in its proper place, diversion of the river.[39]

"During the first diversion season", it provides, "the efforts of the Contractor shall be concentrated on excavating and preparing the foundations in the main cofferdam area . . . and placing concrete in the dam section proper up to Elevation 220 (as amended) by the end of the first diversion season."[40]

Other provisions:

> "The Contractor shall not store water in back of the dam or interfere with the natural flow of water during the period of construction except

[36]Exh. A-16-A, GC-05.
[37]Exh. A-16-A, GC-11.
[38]Exh. A-16-3, par. 3, page 3.
[39]Exh. A-16-A, SC-42.
[40]Exh. A-16-A, SC-42 *d.*

as necessitated by diversion requirements, unless specifically approved or directed."[41]

"The Contractor will be responsible for loss or damage to the diversion structure, construction plant, and any part of the temporary or permanent work, due to failure or inadequacy of any part of the diversion or unwatering program, or due to overtopping of the cofferdams, . . ."[42]

"After the river and local drainage have been diverted from a construction area, all water therein shall be removed by adequate pumps or other means and, upon completion of the excavation, the entire foundation area shall be maintained free from running or standing water to permit inspection of the foundation and placing of embankment and concrete in the dry."[43]

As mentioned above, the government failed to furnish the diversion tunnel on March 1. Against Merritt-Savin's objections, it declined to postpone the operation until 1953 because of the large loss the government would incur thereby, and it insisted on proceeding on June 19. This greatly increased the risk that Merritt-Savin would be unable to get the concrete dam up to 220 feet before overtopping of the cofferdam. Accordingly the government bound itself as per Supplemental Agreement No. 1.[44]

Supplemental No. 1 recited that the government had failed to deliver the diversion tunnel on March 1 and

[41]Exh. A-16-A, Part IV, Sec. 1-02 *b*.
[42]Exh. A-16-A, Part IV, Sec. 1-03.
[43]Exh. A-16-A, Part IV, Sec. 1-05.
[44]Exh. M-20.

had delivered it on June 19, 1952,[45] and that that had delayed the operations of the contractor and increased its risk. The risk referred to was that by beginning so late the contractor might not get the permanent dam up to 220 feet by the time of overtopping, with the result—as happened—that when the cofferdam went out, the resultant flood wave would damage the contractor's works,—which it did, in excess of $800,000.00.[46]

By way of amendment of the main contract, Supplemental provided that if diversion were performed by the contractor as per progress schedule approved by the government, and the diversion works were overtopped by a flood which damaged the cofferdams, construction trestle, stationary equipment or the works protected by the cofferdams, the contractor would make the repairs necessary to permit resumption of the work, and that he would be paid for such work, except that the government's liability to make such payment would not include damaging overtopping occurring after June 15, 1953 or the date on which the low monolith of the main dam was completed to elevation 220, whichever occurred first, and also that the payments to the contractor for such repairs would not exceed $500,000.00.

Supplemental No. 1 also provided "that during the period of the Government's liability as delineated

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[45]Though the supplemental agreement had been entered into prior to June 19, the document itself was not signed until after that date.

[46]Exh. A-65.

above, the Contractor shall work as large a force of men and as much plant as much time as practicable, but in any event not less than twelve 10 hour shifts per week unless impossible, on the river diversion and all work protected by the cofferdams."

Such are the main terms of the contract bearing on the question whether appellants' actions on the day of the flood were done in *compliance* with the contract as *required* by it. Now, to procure further light on the question, let us look briefly at what happened on that day, especially the control that the government actually exercised over appellants on that occasion.

The night before—about 10:30 P.M. on January 8—Corps engineer Burks received a telephone call from the Corps guard that the river forecast was formidable. He went to the scene and inspected it; then advised Jenkinson, Project Engineer of the Corps, and representatives of Merritt-Savin and of Atkinson. About 1:00 A.M., January 9, he suggested to Merritt-Savin that they seriously consider moving certain heavy equipment to higher ground. They did so, shortly thereafter.[47]

During the day of January 9, Burks received weather and river forecasts and relayed them to the interested parties.[48] Shortly after noon, he recommended to Merritt-Savin that they not start placement of one of the concrete monoliths.[49]

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[47]T. 1449-1453; 1466.
[48]T. 1455, 1456.
[49]T. 1454.

Stinson, Project Manager of Merritt-Savin, testified that in the early morning of January 9 he suggested to the Corps Project Engineer, Jenkinson, that Merritt-Savin take all their equipment out. He continued:

"Q. What did Mr. Jenkinson say when you suggested to him that you move your equipment out?

A. He wanted to call Sacramento office.

* * * * *

Q. Do you know whether or not Mr. Jenkinson did call the Sacramento office?

A. He must have. He came back and told me not to pull it out, that Mr. Morton said not to pull it out until they let us know.

* * * * *

Q. Can you fix the approximate time of that statement?

A. I don't know. It was sometime after the conversation about it. I don't know. Say 10:00 o'clock, in the neighborhood of 10:00 o'clock, if you want to."[50]

Stinson testified that around noon, January 9, "they told us to pull the equipment out, that it (the upstream cofferdam) would probably be overtopped"; that at that time he did not think of breaching the cofferdam because the Corps "wanted to hold it as long as they could."[51]

He said that Merritt-Savin then started to remove their equipment and had got most of it out around 5:00 P.M.[52]

[50]T. 1512, 1513. Also T. 1522.

[51]T. 1504, 1505; 1501.

[52]T. 1514.

Burks testified that at about 4:00 P.M., January 9, his superior, Jenkinson, told him "by radio to tell Mr. Stinson to cut a notch in the top of the upstream cofferdam". Then:

"Q. You relayed that message to Mr. Stinson?
A. Yes, sir.
Q. And was such a notch cut?
A. Yes, sir."[53]

Stinson testified that around 6:00 P.M. leakage developed around the discharge pipes; and that after quite a few minutes "it commenced letting go and washing out . . ."[54]

Jonathan Goodier, an Atkinson engineer, testified that he saw a caterpillar cutting a notch in the middle of the cofferdam, and that water seeped through this notch.[55] By 6:09 P.M. the water was spilling over the cofferdam and the cofferdam was opening quite rapidly and the water was gushing through.[56] From the sudden flow of water, damage to the works of both appellants and appellee resulted.

Appellants Acted As Required by the Government.

The issue is now clear. Appellee says we should have breached the cofferdam earlier, before the water reached damaging proportions. We answer that we were bound under our contract not to do so. On the day in question, the government directed us not to

[53]T. 1454, 1455. Photo of notching, Exh. A-3; T. 1478, 1479.
[54]T. 1520, 1521.
[55]T. 241-243.
[56]T. 301.

do so until the moment we did. There is no question about that. The only question is whether we were bound under the contract to defer breaching until the government consented. As to that, we say we were so bound.

First, we ask the Court to consider Supplemental Agreement No. 1. As shown above, that Agreement provided that the government would pay to appellants up to $500,000 for damage suffered by appellants for overtopping occurring prior to June 15, 1953 or the date when the low monolith of the main dam reached elevation 220. Then, as above shown, it provided "that during the period of the Government's liability as delineated above, the Contractor shall work as large a force of men and as much plant as much time as practicable, but in any event not less than twelve 10 hour shifts per week unless impossible, on the river diversion and all work protected by the cofferdams." Could appellants have breached the cofferdam without the consent of the government and even against its express prohibition, and thus have interrupted the work for several months, without fear of breaking that clause of the agreement? We think not. The clause requires the contractor to continue its work on the dam at maximum capacity and speed. To flood the works, with such consequent delay, would be a clear violation of the clause.

This conclusion harmonizes with the provision in Special Condition 42 *f* above quoted, that if the concrete dam is not sufficiently high to continue diversion after overtopping of the cofferdam at the end of the

1952 diversion season, the cofferdam shall be reconstructed "at the end of the flood season" and the river thus be rediverted. In other words, there was a contrast between the situation prior to the overtopping and afterwards. Prior thereto, the situation was this. The government had put the contractor in the river late in the 1952 season. For this it agreed to indemnify him for his risk to the end of that flood season and it required him to work at top speed during that time. *After* overtopping, the contractor would be entering the river at a normal time, i.e. "at the end of the flood season", and the reasons for the extraordinary provisions in Supplemental Agreement No. 1 would not apply.

Moreover, numerous provisions of the contract lead to the conclusion that appellants were bound by government directives on this matter. These clauses have been set forth above. We mention especially the following:

The contract provided that the contractor was to concentrate on getting the concrete dam up to elevation 220 in the first diversion season, because if that had been accomplished work on the dam could have continued, with perhaps a few temporary interruptions, throughout the flood season; whereas breaching the cofferdam on January 8 or 9 ended the work for the season. It provided that the contractor had to work with faithfulness and energy to get the work done within a specified time; that the government could require him to increase the number of shifts to keep up with schedule; that after diversion the con-

struction area was to be kept dry; that the work was to be conducted under the general direction of the government; and that for failure to comply with requirements the government could terminate the contract.

In view of these provisions, could Merritt-Savin, on January 8 or 9, have breached the cofferdam, against the explicit direction of Jenkinson, Project Engineer of the government without fear of violation of the contract? We think clearly not. And we think that at the very least a jury could have so found.

It is easy to look back now and say, the cofferdam should have been breached before the water reached threatening proportions; but the decision had to be made *then,* when the height that the water would eventually reach was unknown. As Colonel Haug, the Corps man, testified, "As of today, my 20-20 hindsight is very good, and I say it would have been a prudent thing to remove the cofferdam on the 8th of January."[57] *Before* the breach, the government had to act on *foresight,* and they decided to stay with the situation until the afternoon of the 9th, and it would have been a rash contractor who would have defied them.

For the purpose of this case, all we have to establish is that it could reasonably be inferred, from the wording of the contract and all the surrounding facts, that such was the intention of the parties; because when such is the case, it is a question of fact for the jury. That is, while construction of a contract is

[57]T. 1131.

ordinarily for the court, where the terms of the contract are uncertain and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, and conflicting inferences may be drawn therefrom as to what that intent is, it is a question of fact for the jury.

Hawkins v. Frick-Reid Supply Corporation (1946), 154 F. 2d 88, 89;
53 Am. Jur. 229, 230;
65 A.L.R. 652.

We submit that all the elements of the above doctrine are present in this case.

The reason why appellants do not claim the government contract defense with respect to the May 20 incident is that the government had left appellants to their discretion when to reenter the river and how long to leave the new cofferdam in on that occasion.

The Plan Was Not Inherently Dangerous

Appellee conceded that there was nothing inherently dangerous about the plans and specifications, *except* that appellee contended that if the plans and specifications were to be interpreted as requiring that the cofferdam be left in position until it overtopped and washed out, then the plan was inherently dangerous.[58]

The answer to this is that the question whether the plan was inherently dangerous, or if it was, whether appellants knew or should have known that it was, was not a matter of law, but a question of fact for

[58]T. 1376; 1381, 1382.

the jury to determine; and the instruction requested by appellants for the purpose of putting the government contract defense in issue would have presented that question to the jury.

We believe, therefore, that this does not raise a serious point on this appeal.

Before leaving this point of the government contract defense, it is interesting to note that in ruling on the point a long colloquy occurred between the trial court and counsel, in which the court asked counsel for appellee if he was willing to accept the burden of a ruling in his favor and counsel said he was. The substance of the colloquy on this point is disclosed in the following excerpts from the transcript:

> "The Court. . . . since this is a key question in this case, and it involves what I consider to be, perhaps, the best law question in the case—and when I say 'best,' I mean the 'nicest' in the terms of the most difficult to decide.
>
> Mr. Johnson. Do I want to risk it?
>
> The Court. Are you willing to accept the burden of having to carry an affirmative ruling in your favor where, if the instruction were given and you had a verdict anyway, you wouldn't have the infirmity in the case?
>
> Mr. Johnson. I understand fully the responsibility, and I am able to answer immediately, we certainly will carry that burden.
>
> * * * * *
>
> The Court. Well, I asked that question because to me there are, sometimes, alternatives that you can take in close questions.

Mr. Johnson. Well, I don't think there is an alternative here.

The Court. Where you can take, what should I say, a less hazardous position. And this is not to say that there is any vacillation here from the point of view of any party, but it creates in my mind a most serious question, where it is conceded that there is no defect in planning, that then the party who is carrying out plans can rely upon the plan to relieve them of responsibility.

Mr. Johnson. That's right.

The Court. And if they carry out the plan properly, then there is no negligence. Doesn't that stand on its own, if they carry out the plan properly?

Mr. Johnson. Surely.

The Court. Your position is, I take it, unequivocally that they didn't carry out the plan properly.

Mr. Johnson. That is right, and it is a simple question of negligence. That is exactly right."[58a]

We submit that the apprehension expressed by the trial judge was well founded, and that to ensure a fair trial to appellants, the "close" and "most serious question" he referred to should have been decided the other way.

II

IN ANY EVENT, $110,000.00 OF THE JUDGMENT WAS IMPROPER

Even if appellants were liable, the evidence fails to support the judgment to the extent of $110,000.00.

[58a]T. 1403-1405.

The total judgment is $519,761.73, which is the whole amount prayed for. This sum is divided as follows:

Damages due to the January 9, 1953 incident:		
Loss of and damage to equipment and building	$ 33,183.06	
Reconstruction and repair of the concrete and steel cellular cofferdam	225,978.32	
Pumping out area of power house site and removal of muck and debris	108,578.80	
Increase in wages payable by reason of fact that plaintiff's work was delayed	18,580.12	
Additional interest payable by reason of the delay on money borrowed to finance the work	7,467.39	
Premium time and other costs to avert 1954-55 winter losses	50,000.00	
Loss of job momentum and interference with job efficiency	50,000.00	
		$493,787.69
Damages due to the May 20, 1953 incident:		
Moving equipment, materials and supplies out of the Power Plant site area, pumping out water and removal of debris; moving equipment, materials and supplies back into Power Plant site area	$ 15,974.04	
Premium time and other costs to avert 1954-55 winter losses	5,000.00	
Loss of job momentum and interference with job efficiency	5,000.00	
		$ 25,975.04
		$519,761.73[59]

[59]Exh. A-208. Further breakdown of the liquidated figures in this Exhibit may be found in Exhs. A-210 and A-211.

The items we are challenging are the two $50,000.00 items in the Jan. 9 incident and the two $5,000.00 items in the May 20 incident, or a total of $110,000.00. We say that the evidence fails to contain proof of these sums of damage.

The other sums were actual expenditures made by appellee in repairing the damage to its works, as shown by its books and by the testimony of Harry L. James, one of the assistants to the general manager of appellee.[60]

The only evidence to support the four round figures which total $110,000.00 is the testimony of Mr. James.

Referring to the item of $50,000.00 for premium time, etc. in relation to the January 9 incident, James testified that, after the accident, in addition to repairing the damage to its works appellee had to go forward with the job, including completion of certain portions of this further work prior to the flood season of 1954 and 1955; that to do this, appellee incurred overtime costs due to working on Saturdays, Sundays and multiple shifts per day, as compared to a normal single-shift operation; that part of this overtime was due to speed-up necessitated by delay caused by the damage to its works; and that the first $50,000.00 item represented an estimate of that part of the cost of this overtime which was attributable to this delay.[61] He testified:

> "That is *not a calculated figure* as the preceding ones were. It is *an estimate based on the judg-*

[60]T. 588 et seq.
[61]T. 604, 605.

ment of our management of what it cost us in premium payroll payments largely, such as the premium cost of working on Saturdays and on some Sundays; the premium cost of working shift work, that is, multiple shifts, two or three shifts per day, as compared to a normal single-shift operation."[62] (Emphasis supplied.)

Asked whether Atkinson would not have incurred those additional expenses except for the delays caused by these two floods, he said:

"Except for the delays which forced us to speed up the work to avoid that winter situation. And I would like also to say this: That $50,000.00 here does not represent the entire cost of such overtime premium and shift differential pay. We felt that certainly we would have been involved in some of that sort of cost in any event, and in arriving at this figure *our management decided on $50,000.00* as being a reasonable portion of the whole which was estimated to be perhaps $70,000.00.

Q. In the instance of this item, Mr. James, you have stated that *it is not what you call a calculated figure,* at least I take it, upon a precise total?

A. That's right.

Q. But that it is *an estimation of Management* of a proper apportionment, is that correct?

A. That's correct.

Q. And in making that apportionment, have you related it to actual expenditures reflected on the books as having been paid?

---

[62]T. 604.

A. Well, to this extent: It is substantially less than the actual costs of the shift differential and the overtime premiums that were expended. Those amounts during the summer period of 1954, when the tail race excavation was being taken out, at that time alone, amounted to in the neighborhood of $50,000.00, and approximately a similar cost was involved in the penstock tunnel excavation speed-up with $18,000.00 or $20,000.00.

Q. So that this item, then, of $50,000.00, does not represent the total actually paid, but rather is *an apportionment based upon judgment?*

A. That's correct."[63] (Emphasis supplied.)

Regarding the second $50,000.00, which was for oss of job momentum, James testified:

"That is similarly an amount that was arrived at through the exercise of *the judgment of the Management* of the job in an effort to evaluate some factors that are *not really susceptible to calculation* but can be gauged from experience on construction jobs and in that work.

They represent the loss of the efficiency of our workmen during the period following the flood. They represent what we have called the loss of momentum, which might also be described as the effect of being off balance and off schedule, and they also include such items as the cost of going out and, after the layoff that resulted from this flood, having to recruit and round up and train a new crew, and of having to weed out the new men that you have got who were undesirable for one reason or another, and find someone else.

[63] T. 605, 606.

That sort of thing, *which I don't think anyone could possibly go on a job and calculate, except through arbitrary factors.*

The figure, I have been told, was based largely on an over-all sort of look at the loss of efficiency."[64] (Emphasis supplied.)

As to the two items of $5,000.00 each in reference to the May 20th incident, James testified that his explanation would be the same.[65]

On cross-examination James testified, regarding the two $50,000.00 figures:

"Those were Management judgment, as I understand it, primarily by Mr. George Atkinson personally, with——

Q. Mr. George Atkinson personally?

A. Yes. And after consulting with Mr. Jennett, and very likely with others in the Management staff there.

Q. Isn't that in effect a figure that you might say reflects what you believed would be a loss in anticipated profits at the end of the job?

A. No; it does not.

Q. It doesn't?

A. No.

Q. No relation to that figure?

A. No. It anticipates or it reflects solely what we originally, at the time of this first run-down of the thing, anticipated as additional costs of doing the work which we were required to do under our contract."[66]

---

[64]T. 606, 607.

[65]T. 609, 610.

[66]T. 620, 621.

Also:

"To the extent that anything we spent, including these figures, would not have been spent expect for the January flood, we certainly would have had them, or presumably would have had them at the end of the job. However, the amounts that we are asking for here are our estimate of costs and expenses to which we were put that we would not have incurred except for the January flood.

Q. The other items except for these two $50,000.00 items on January 9th consist of direct expense and indirect expense; is that correct, sir?

A. All of the items including these two consist of direct expense and indirect expense, the principal difference being that the remaining items were susceptible of actual computation, mathematical computation, whereas these two are based on *the judgment of our top management* as to what certain costs were *that were not susceptible of mathematical computation. . . .* "[67] (Emphasis supplied.)

Conceding, for the sake of the argument, that appellee suffered some damage of the types indicated, we submit that the evidence fails to establish the amount of such damage. The law on the subject is this:

Where the evidence shows that some damage was suffered, recovery will not be denied because the *amount* of the damage is uncertain. However, the amount must not be left to speculation or conjecture,

[67] T. 623.

and there must be a showing of facts so that the loss can be measured with reasonable certainty.

78 A.L.R. 858;
15 Am. Jur. 415;
Shannon v. Shaffer Oil & Refining Co. (1931), 51 F. 2d 878.

The injured party must present the best evidence reasonably available to show the amount of the damage.

Kelite Products v. Binzel (1955), 224 F. 2d 131, 145;
Stott v. Johnston (1951), 36 Cal. 2d 864, 876, 229 P. 2d 348.

Determination of the amount of damage is for the jury. The evidence must afford data, facts, and circumstances reasonably certain from which the jury may find the actual loss.

15 Am. Jur. 796;
United Electrical etc. Workers v. Oliver Corp. (1953), 205 F. 2d 376, 387.

Damages should be proved by statements of fact rather than by the mere conclusions of witnesses. Plaintiff's mere statement or assumption that he has been damaged to a certain amount without stating any facts on which the estimate is made is too uncertain.

25 C.J.S. 813;
Kremar v. Wisconsin River Power Co. (1955), 270 Wis. 640, 72 N.W. 2d 328, 331;
Goynes v. St. Charles Dairy Inc. (1940), La. App., 197 So. 819, 821;

Albanese v. New Haven etc. Co. (1959), 146 Conn. 485, 152 A. 2d 505, 507;
McCracken v. Stewart (1950), 170 Kan. 129, 223 P. 2d 963, 968.

James' testimony fails to meet these requirements.

In the first place, he is not the one who made the estimates. He testified that the estimates were made by "top management". Therefore the testimony is pure hearsay. And the hearsay is aggravated by the fact that even the sources of the hearsay are not disclosed. James said that the figures were management judgment, "*as I understand it,* primarily by Mr. George Atkinson personally . . . and after consulting with Mr. Jennett, and *very likely with others* in the Management staff there." (Emphasis supplied.) Thus it is compound hearsay. Atkinson himself consulted others, *very likely*. And these others are undisclosed. And even that Atkinson made the estimates, with or without consultation with others, is not unqualifiedly true; the witness said that, as he *understood* it, it was so. To rest a judgment for $110,000 on testimony like that violates not only fundamental legal principles but also a natural sense of justice.

Next, James concedes that the figures were not "calculated figures", that they were arrived at through the exercise of the judgment of management "in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work", that they represent the "sort of thing, which I don't think

anyone could possibly go on a job and calculate, except through arbitrary factors". This was an honest description of the process of "estimation" employed to produce these two figures of $50,000. It is a very accurate description of the kind of evidence which is held to be insufficient to sustain an award of damage.

Finally, even if this element of damage were susceptible of computation, the facts showing the basis of the computation should have been shown by the evidence. To illustrate this point, let us consider the first item of $50,000, the one for overtime. The work on which this overtime was incurred was work which Atkinson had to do in any event to go forward with its project, and its claim is that because of the delay caused by the washing out of the cofferdam, it had to do that work faster than it would otherwise have had to do. That involved more overtime labor than would otherwise have been necessary; and the question is, what proportion of that overtime was due to the speed-up? The way to determine that would be to consider the specific data, somewhat as follows:

First, the task on which the overtime in question was performed would have to be determined. That would constitute the starting point. Then the number of men employed on that work would be determined; then the number of hours they worked, and the amount of wages paid to them; and then the portion of those wages which constituted overtime. That would produce a definite liquidated amount of cost.

The remaining question would be, what proportion of that sum was due to the speed-up occasioned by

appellants' acts? Here is where the very important element of judgment or estimation comes in—the determination of the fraction to be applied to the definite cost figure. Obviously the fraction should not be arbitrary; it should have a reasonable basis in fact, as for example by figuring the labor cost at the ordinary rate of performance without the speed-up and attributing the remainder of the cost to the speed-up; or perhaps a contractor's cost accounting might provide other and better methods of answering the question. The point is that the law requires *some such data* to be presented in evidence to enable the jury to determine the damages, instead of permitting a witness, as was done here, to merely give the jury a figure of $50,000 without supporting data. The latter fails utterly to meet the requirements of the law as to recoverable damages.

A similar observation relates to the second item of $50,000, namely, the one for loss of job momentum and interference with job efficiency. Supporting data for that item would be necessary as in the case of the other $50,000 item.

The two $5,000 items in relation to the May 20 incident are identical in character to the two $50,000 items, and are therefore subject to the same criticism.

It is respectfully submitted, therefore, that as to $110,000 of the damages, the evidence is insufficient to support the judgment. This insufficiency is so glaring that the only explanation of this item in the judgment is that since it constituted only about one-fifth of the total judgment it did not get the attention that it

deserved. As a test of this, we think it inconceivable that if the lawsuit had been limited to this item of damage the judgment would be permitted to stand on evidence like that. And viewed in itself, $110,000 is a very large sum of money.

CONCLUSION

Appellants have been subjected to an enormous verdict. They have been so subjected without their chief defense, namely that they acted in compliance with the government's directions, being presented to the jury. The trial court determined as a matter of law that they were not bound by the government's directives, whereas anyone looking at the evidence would have to concede that it would have been a rash contractor who on the day in question would have destroyed his cofferdam against the explicit command of the government and thus set back the government's project for the rest of the winter. All we are asking is that at least the issue be presented to the jury. For this reason we request that the judgment be reversed and the cause remanded for a new trial. The new trial would be applicable to the January 9 incident only, because for the reasons above stated, the error complained of is not applicable to the May 20 incident.

Next, we contend that for the reasons mentioned, even if appellants were liable, the judgment should be reversed as to $110,000 thereof, because the evidence in regard to that sum fails in fundamental respects

to meet the legal requirements of proof of recoverable damages.

Dated, San Francisco, California,
April 18, 1961.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
HAROLD R. MCKINNON,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

INSTRUCTION REFUSED

(Specification of Error No. 1)

"Instruction No. 13

Requested by Defendants.

Subject: Governmental Defense Doctrine.

Where a party such as the defendants, Merritt-Savin, contracts with a public agency, such as the Corps of Engineers of the U. S. A., to construct a project such as Folsom Dam, according to plans, specifications and directives supplied and issued by the Corps of Engineers, and such contractor performs the project work with proper care and skill in accordance with the Corps of Engineers' plans, specifications and directives, but the work thus planned, specified and directed results in damage to others, such as the plaintiff, Guy F. Atkinson, the contractor, Merritt-Savin, is not liable for such damage unless such contract plans, specifications or directives were inherently dangerous or defective and the contractor knew, or should have known in the exercise of ordinary care, that such contract plans, specifications or directives were inherently dangerous to the property of others.

The doctrine I have just stated to you is not applicable to the events of May 13th through May 20th, 1953.

As to the events before and on January 9, 1953, it is a question of fact for the jury to determine whether

the defense afforded by this doctrine is a defense to the defendants in this case.

In this connection you may consider the question as to whether there was or was not inherent danger, and if the defendants knew or should have known of such inherent danger, if any there was, in the plans, specifications or directives of the Corps of Engineers relating to overtopping of the Folsom Cofferdam, the specified maximum elevation of 250 feet of said Cofferdam, the directives of the Corps of Engineers to the defendants to divert the American River in 1952, the provisions of Supplemental Agreement No. 1 between the Corps of Engineers and the defendants, or the directives of the Corps of Engineers to the defendants on January 9, 1953.

In this respect you are instructed that the case of the plaintiff against the U.S.A. is not a matter to be given consideration by the jury and it is not necessary for you to determine whether or not the U.S.A. is or is not liable to the plaintiff for its claimed damage, if any. The only issue in this case is whether or not the plaintiff is entitled to recover its claimed damage, if any, from the defendants."

INSTRUCTION GIVEN

(Specification of Error No. 2)

"Now, coming to the contract here. In connection with the flood on January 9, 1953, the plans and specifications of the Folsom Dam documents, which include the contract, the plans and specifications, Supplemental Agreement No. 1, and change orders required as to the upstream cofferdam that Merritt-Savin, the contractor build an upstream diversion cofferdam at a specified location with a minimum elevation of 237 and a maximum elevation of 250. Subject only to these limitations the defendants were charged with the responsibility and had the discretion to design an upstream cofferdam of any type, to construct the cofferdam and to select the materials to be used in the construction of it. Once having completed its construction, the defendants had discretion on the operation and maintenance of the upstream cofferdam above elevation 237 and below elevation 250, which included the discretion to determine whether the upstream cofferdam would be voluntarily breached, or overtopped at elevation 250 or at any elevation down to elevation 237.

Now as I say, here, this is an instruction concerning the legal interpretation of the contract, and I am not here in any way attempting to invade your province as to determining what the facts were."

INSTRUCTION GIVEN

(Specification of Error No. 3)

"Now, we have had some discussion here about the government contracts, and I am merely mentioning this to delimit the use of these contracts. These apply equally to both parties. The contracts set the framework in which the rights, duties and liabilities of the parties were set. It is my duty as the Court to instruct you as a matter of law as to what the rights, duties and liabilities were under the contract. Then the acts that were performed thereunder—these are matters for you to determine as to whether or not they establish any rights, duties, or liabilities within the law as I tell you about it.

Now, various provisions of the contract between the defendant Merritt-Savin and the United States, acting through the Corps of Engineers for the construction of a main dam at Folsom, and various provisions of the contract between Atkinson and the United States of America, acting through the Bureau of Reclamation for the construction of the Folsom power house, have been read to you or referred to during the trial. And certain provisions deal with the liabilities as between the parties to the contract for damage to temporary and permanent works of the project. Now, I want to make this point here, that they deal with liabilities between the parties to the contract. Here I want to point out to you that there were two contracts. There was the contract between Atkinson and the United States, that is, the plaintiff and the United States, acting through the Bureau of Recla-

mation; and then there was the contract between the defendant, Merritt-Savin, and the United States, acting through the Corps of Engineers. Now, there was no contact between Merritt-Savin and Atkinson, and the contract related to the rights, duties and liabilities of the parties involved in the contracts. So these provisions deal with the rights of the contractors and the United States in their respective contracts, and do not create any rights or obligations between the plaintiff Atkinson and Merritt-Savin in this lawsuit. You are to disregard them in that respect. For instance, in the contract between the United States and Atkinson, Atkinson assumed certain responsibilities insofar as the United States was concerned. The same is true insofar as Merritt-Savin was concerned in its contract with the United States, but Merritt-Savin cannot take advantage of any responsibility of Atkinson to the United States, nor, on the other hand, can Atkinson take advantage of any responsibility of Merritt-Savin to the United States. The point to remember here is that these contracts, when they are considered, while they set up the framework in which certain work was done, the duties of each of the contractors to the United States or the rights of each of the contractors with the United States should not be applied to the other contractor and the other contract. And I want you to make that careful distinction when you consider this matter."